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CALIFORNIA OFFICE OF ADMINISTRATIVE LAW  
SACRAMENTO, CALIFORNIA

MARCH FONG EU  
SECRETARY OF STATE  
OF CALIFORNIA

In re:	)	1990 OAL Determination No. 19
Request for Regulatory	)	
Determination filed by	)	[Docket No. 90-002]
County of Ventura	)	
concerning the State	)	December 26, 1990
Water Resources Control	)	
Board's "Model Well	)	Determination Pursuant to
Standards Ordinance	)	Government Code Section
Adopted in Accordance	)	11347.5; Title 1, California
with Water Code Section	)	Code of Regulations,
13801, " dated November 1,	)	Chapter 1, Article 3
1989.	)	
	)	
	)	
	)	

Determination by:

JOHN D. SMITH, Director

Herbert F. Bolz, Coordinating Attorney  
Victoria S. Cline, Staff Counsel  
Rulemaking and Regulatory  
Determinations Unit

SYNOPSIS

The issue presented to the Office of Administrative Law is whether or not the State Water Resources Control Board's "Model Well Standards Ordinance" is a "regulation," and therefore without legal effect unless adopted in compliance with the Administrative Procedure Act.

The Office of Administrative Law has concluded that the Board's "Model Well Standards Ordinance," dated November 1, 1989, is a "regulation" because the Ordinance implements, interprets and makes specific statutory law governing water quality.

THE ISSUE PRESENTED <sup>2</sup>

The Office of Administrative Law ("OAL") has been requested to determine<sup>3</sup> whether or not the State Water Resources Control Board's ("Board") "Model Well Standards Ordinance Adopted in Accordance with Water Code Section 13801" ("Ordinance"), issue date November 1, 1989, is a "regulation" required to be adopted pursuant to the Administrative Procedure Act ("APA").

THE DECISION <sup>4, 5, 6, 7, 8</sup>

OAL finds that:

(1) the Board's rules are generally required to be adopted pursuant to the APA;

(2) the challenged Ordinance is a "regulation" as defined in the key provision of Government Code section 11342, subdivision (b);

(3) the challenged Ordinance does not fall within any recognized exception to the requirements of the APA; and, therefore,

(4) the challenged Ordinance violates Government Code section 11347.5, subdivision (a).<sup>9</sup>

R E A S O N S   F O R   D E C I S I O N

I. APA; RULEMAKING AGENCY; AUTHORITY; BACKGROUND

The APA and Regulatory Determinations

In Grier v. Kizer, the California Court of Appeal described the APA and OAL's role in that Act's enforcement as follows:

"The APA was enacted to establish basic minimum procedural requirements for the adoption, amendment or repeal of administrative regulations promulgated by the State's many administrative agencies. (Stats. 1947, ch. 1425, secs. 1, 11, pp. 2985, 2988; former Gov. Code section 11420, see now sec. 11346.) Its provisions are applicable to the exercise of any quasi-legislative power conferred by statute. (Section 11346.) The APA requires an agency, inter alia, to give notice of the proposed adoption, amendment, or repeal of a regulation (section 11346.4), to issue a statement of the specific purpose of the proposed action (section 11346.7), and to afford interested persons the opportunity to present comments on the proposed action (section 11346.8). Unless the agency promulgates a regulation in substantial compliance with the APA, the regulation is without legal effect. (Armistead v. State Personnel Board (1978) 22 Cal.3d 198, 204, 149 Cal.Rptr. 1, 583 P.2d 744).

"In 1979, the Legislature established the OAL and charged it with the orderly review of administrative regulations. In so doing, the Legislature cited an unprecedented growth in the number of administrative regulations being adopted by state agencies as well as the lack of a central office with the power and duty to review regulations to ensure they are written in a comprehensible manner, are authorized by statute and are consistent with other law. (Sections 11340, 11340.1, 11340.2)." [Footnote omitted; emphasis added.]<sup>10</sup>

In 1982, recognizing that state agencies were for various reasons bypassing OAL review (and other APA requirements), the Legislature enacted Government Code section 11347.5. Section 11347.5, in broad terms, prohibits state agencies from issuing, utilizing, enforcing or attempting to enforce agency rules which should have been, but were not, adopted pursuant to the APA. This section also provides OAL with the authority to issue a regulatory determination as to whether a challenged state agency rule is a "regulation" as defined in subdivision (b) of Government Code section 11342.

The Rulemaking Agency Named in this Proceeding

The State Water Resources Control Board (the "State Board") and the California Regional Water Quality Control Boards (the "Regional Boards") are "the principal state agencies with primary responsibility for the coordination and control of water quality. . . ." <sup>11</sup> The State Board sets policy for and coordinates the statewide program for water quality control for all the waters of the state. <sup>12, 13</sup> A Regional Board administers the statewide program for water quality control within each of the State's nine designated geographical regions. <sup>14, 15</sup> The State Board and the Regional Boards are in the Resources Agency, <sup>16</sup> a part of the executive branch of State government.

Authority <sup>17</sup>

The State Board and the Regional Boards have quasi-legislative powers to adopt, amend and repeal administrative regulations concerning water quality control. With regard to the rulemaking authority of the State Board, <sup>18</sup> Water Code section 1058 provides:

"The board may make such reasonable rules and regulations as it may from time to time deem advisable in carrying out its powers and duties under [the Water Code]."

The State Board exercises "the adjudicatory and the regulatory functions of the state in the field of water resources." <sup>19</sup> Water Code section 13001 provides in part:

"It is the intent of the Legislature that the state board and each regional board shall be the principal state agencies with primary responsibility for the coordination and control of water quality. . . ." [Emphasis added.]

These sections expressly delegate to the State Board the power to adopt quasi-legislative administrative regulations to govern water quality control in California. Moreover, the State Board has implied quasi-legislative power to adopt regulations necessary to exercise powers expressly granted to it. <sup>20, 21</sup>

Background

Water Code section 13801 requires the Board to prepare and adopt a comprehensive model ordinance regarding water,

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cathodic protection and monitoring wells. The statute states in part:

- "(b) Notwithstanding subdivision (a), the state board shall . . . adopt a model water well, cathodic protection well, and monitoring well drilling and abandonment ordinance implementing the standards for water well construction, maintenance, and abandonment contained in Bulletin 74-81 of the [Department of Water Resources]. . . .
- "(c) Notwithstanding any other provision of law, each county, city or water agency, where appropriate, shall . . . adopt a water well, cathodic protection well, and monitoring well drilling and abandonment ordinance that meets or exceeds the standards contained in Bulletin 74-81. . . .
- "(d) If a county, city, or water agency, where appropriate, fails to adopt an ordinance establishing water well, cathodic protection well, and monitoring well drilling and abandonment standards, the model ordinance adopted by the state board pursuant to subdivision (b) shall take effect on February 15, 1990, and shall be enforced by the county or city and have the same force and effect as if adopted as a county or city ordinance."

[Emphasis added.]

On or about November 1, 1989, the Board approved a resolution which adopted the "Model Well Standards Ordinance Adopted in Accordance with Water Code Section 13801." On January 29, 1990, Arthur E. Goulet, Director, Public Works Agency of the County of Ventura (the "Requester"), filed a Request for Determination with OAL challenging the Board's Model Ordinance. The Requester alleges:

"As part of the State Board's proceedings, we submitted comments concerning the model ordinance the concept of which, by the way, we support. In making our comments, we raised the issue of whether or not the model ordinance should more properly be adopted by regulation rather than simply by resolution of the State Board. Further, we noted that a number of the sections of the model ordinance appeared to regulate the agency which would be adopting the ordinance rather than persons who would be subject to the requirements of the ordinance. Examples of this are Section 2.4.4, Section 6, Section 6.2 and Section 12. I

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have enclosed a copy of our letter to the State Board, for your information.

"I would appreciate it if you would make a determination as to whether or not the ordinance or any portion of it should have been more properly adopted by regulation rather than by the process the State Board used."

On July 6, 1990, OAL published a summary of this Request for Determination in the California Regulatory Notice Register,<sup>22</sup> along with a notice inviting public comment. No public comments were received. On August 20, 1990, the State Board submitted its response to this Request.

## II. ISSUES

There are three main issues before us:<sup>23</sup>

- (1) WHETHER THE APA IS GENERALLY APPLICABLE TO THE BOARD'S QUASI-LEGISLATIVE ENACTMENTS.
- (2) WHETHER THE CHALLENGED RULE IS A "REGULATION" WITHIN THE MEANING OF THE KEY PROVISION OF GOVERNMENT CODE SECTION 11342.
- (3) WHETHER THE CHALLENGED RULE FALLS WITHIN ANY ESTABLISHED GENERAL EXCEPTION TO APA REQUIREMENTS.

FIRST, WE INQUIRE WHETHER THE APA IS GENERALLY APPLICABLE TO THE BOARD'S QUASI-LEGISLATIVE ENACTMENTS.

Several provisions of law evidence the applicability of the APA to "regulations" adopted by the Board.

Government Code section 11346 provides that "[i]t is the purpose of this article to establish basic minimum procedural requirements for the adoption, amendment or repeal of administrative regulations. . . ." The section goes on to say:

"the provisions of this article are applicable to the exercise of any quasi-legislative power conferred by any statute heretofore or hereafter enacted, but nothing in this article repeals or diminishes additional requirements imposed by any such statute. . . ." [Emphasis added.]

Another section, Government Code section 11343, subdivision (a), provides that "e]very state agency shall:

"(a) Transmit to the office for filing with the Secretary of State a certified copy of every

regulation adopted or amended by it . . . ."24  
[Emphasis added.]

The Board is a "state agency" as that term is defined in Government Code section 11000.<sup>25</sup> Government Code section 11342, subdivision (b), clearly indicates that, for purposes of the APA, the term "state agency" applies to all state agencies, except those "in the judicial or legislative departments."<sup>26</sup> Since the Board is in neither the judicial nor legislative branch of state government, we conclude that APA rulemaking requirements generally apply to the Board.<sup>27</sup>

In addition, the State Board is expressly authorized by Water Code section 1058 (quoted above under "Authority") to adopt regulations on water quality control.<sup>28, 29</sup> Examples of the Board's applied rulemaking authority are contained in the California Code of Regulations ("CCR").<sup>30, 31</sup>

SECOND, WE INQUIRE WHETHER THE CHALLENGED RULE IS A "REGULATION" WITHIN THE MEANING OF THE KEY PROVISION OF GOVERNMENT CODE SECTION 11342.

In part, Government Code section 11342, subdivision (b), defines "regulation" as:

" . . . every rule, regulation, order, or standard of general application or the amendment, supplement or revision of any such rule, regulation, order or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, . . ." [Emphasis added.]

Government Code section 11347.5, authorizing OAL to determine whether or not agency rules are "regulations," provides in part:

"(a) No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a ['']regulation[''] as defined in subdivision (b) of Section 11342, unless the guideline, criterion, bulletin, manual, instruction [or] . . . standard of general application . . . has been adopted as a regulation and filed with the Secretary of State pursuant to [the APA] . . . ." [Emphasis added.]

In Grier v. Kizer,<sup>32</sup> the California Court of Appeal upheld OAL's two-part test as to whether a challenged agency rule

is a "regulation" as defined in the key provision of Government Code section 11342, subdivision (b):

First, is the challenged rule of the state agency either

- o a rule or standard of general application or
- o a modification or supplement to such a rule?

Second, has the challenged rule been adopted by the agency to either

- o implement, interpret, or make specific the law enforced or administered by the agency or
- o govern the agency's procedure?

If an uncodified rule fails to satisfy either of the above two parts of the test, we must conclude that it is not a "regulation" and not subject to the APA. In applying this two-part test, however, we are mindful of the admonition of the Grier court:

"... because the Legislature adopted the APA to give interested persons the opportunity to provide input on proposed regulatory action (Armistead, supra, 22 Cal.3d at p. 204, 149 Cal. Rptr. 1, 583 P.2d 744), we are of the view that any doubt as to the applicability of the APA's requirements should be resolved in favor of the APA." [Emphasis added.]<sup>33</sup>

A. Part One - Does the Model Well Ordinance Establish A Rule or Standard of General Application or Modify or Supplement Such a Rule?

The answer to the first part of the inquiry is "yes."

For an agency rule or standard to be "of general application" within the meaning of the APA, it need not apply to all citizens of the state. It is sufficient if the rule applies to all members of a class, kind or order.<sup>34</sup> For example, it has been judicially held that "rules significantly affecting the male prison population" are of general application.<sup>35</sup>

The provisions challenged here were clearly intended to apply statewide. Water Code section 13801 mandates the Board to adopt an ordinance that is potentially applicable to each county, city or water agency within California.<sup>36</sup> Where applicable, the Ordinance will affect all members of a



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class, specifically, all persons who are or will be constructing, maintaining, destroying or abandoning a water well.

The Board argues in its Response<sup>37</sup> that "[t]he model ordinance did not become a general standard that must be followed by virtue of any action of the Board," but rather that the general applicability "was predetermined by the Legislature." The Board's argument is unique, but not convincing. Whether the Ordinance's general applicability was created by the Board or "predetermined" by the Legislature is irrelevant. The definition of "regulation" requires general applicability; it does not require that applicability of the challenged rule stem from the adopting agency.

B. Part Two - Does the Challenged Model Well Ordinance Interpret, Implement, or Make Specific the Law Enforced or Administered by the Agency or Which Governs the Agency's Procedure?

The answer to the second part of the inquiry is also "yes."

Again, the Board disagrees with our point of view. Its reasoning is twofold. First, the Board argues that the Ordinance is "nonregulatory" because it "does no more than repeat, restate or paraphrase existing statutes." The only statute referred to by the Board, however, is Water Code section 13801. The Board apparently does not allege that any other statutory provision is being repeated, restated or paraphrased by the challenged Ordinance. The weakness of the Board's argument is evidenced by the Board's failure to point to any specific example to prove its point.<sup>38</sup>

Secondly, the Board also argues that adoption of the Ordinance is "nonregulatory" because "the agency is merely enforcing a statute [Water Code section 13801] which it is required to implement and the agency has adopted the only legally tenable reading of that statute."<sup>39</sup> In 1988 OAL Determination No. 15,<sup>40</sup> we stated:

"In general, if the agency does not add to, interpret, or modify the statute, it may legally inform interested parties in writing of the statute and 'its application.' Such an enactment is simply 'administrative' in nature, rather than 'quasi-judicial' or 'quasi-legislative.'

"If, however, the agency makes new law, i.e., supplements or 'interprets' a statute or other provision of law, such activity is deemed to be an exercise of quasi-legislative power. Quasi-

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legislative power is conferred by statute, either expressly or impliedly.

"In rulemaking, an agency is often free to interpret a statute or another regulation in such a way as to impose an additional requirement on the regulated public. By contrast, in applying a statute or regulation, an agency has much less latitude." [Emphasis added.]<sup>41</sup>

"Fundamental to the issue of whether or not provisions contained in the challenged documents supplement or interpret the law enforced or administered by the agency, is whether or not the law involved needs such further supplementation or interpretation. In a previous Determination we stated:

"If a rule simply applies an existing constitutional, statutory or regulatory requirement that has only one legally tenable "interpretation," that rule is not quasi-legislative in nature--no new "law" is created."<sup>42</sup> [Emphasis added.]"

We agree that the challenged Ordinance would not constitute a "regulation" if it were merely a restatement of law or the only tenable interpretation of the law. The Ordinance, however, cannot be characterized as such.

The Ordinance clearly interprets, implements and makes specific the law enforced or administered by the State Board and the regional boards. Subdivision (b) of section 13801 of the Water Code provides, in part, that:

"the state board shall, not later than September 1, 1989, adopt a model water well, cathodic protection well, and monitoring well drilling and abandonment ordinance implementing the standards for water well construction, maintenance, and abandonment contained in Bulletin 74-81 of the [D]epartment [of Water Resources]." [Emphasis added.]

Bulletin 74-81, "Water Well Standards: State of California," December 1981 ("Bulletin"),<sup>43</sup> is prepared by and available from the Department of Water Resources ("DWR") pursuant to Water Code section 231.<sup>44, 45</sup> This advisory Bulletin (a 92-page booklet) contains recommendations for water well standards. The Ordinance, adopting the Bulletin's standards pursuant to the mandate of Water Code section 13801, consists of a two page "Table of Contents" and eleven pages of text, sections 1 through 13, covering such diverse subjects as "Permits," "Inspections," "Completion Reports,"

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"Appeals," "Criminal and Civil Enforcement" and "Reports to the Regional Board."

In examining the challenged Ordinance, we first look at the general provisions which incorporate DWR's Bulletin. Section 3 of the Ordinance (page 5) states:

"Except as otherwise specified, the standards for the construction, repair, reconstruction, or destruction of wells shall be as set forth in:

"3.1 DEPARTMENT OF WATER RESOURCES BULLETIN 74-81: The California Department of Water Resources Bulletin 74-81 'Water Well Standards, State of California' except as modified by subsequent revisions.

"3.2 ALL SUBSEQUENT SUPPLEMENTS AND REVISIONS: All subsequent Bulletin 74-81 supplements or revisions issued by the Department of Water Resources, once the revised standards have been reviewed at appropriate public hearing."

[Emphasis added.]

As can be seen by the emphasized language above, the Board has gone further than the mandate of its authorizing statute, which incorporates Bulletin 74-81 by reference, by adding the additional requirement of compliance with some currently nonexistent future revisions and supplements of the Bulletin. The validity of an incorporation of future revisions has been discussed in previous determinations and we shall not repeat such discussion here.<sup>46</sup> It is sufficient to recognize that the incorporation of material into a regulation, as such material exists at that specific time, differs greatly from the incorporation of that material along with all future revisions and supplements. We do not here resolve the issue of whether the Ordinance would meet the six substantive standards of Necessity, Authority, Clarity, Consistency, Reference and Nonduplication if submitted to OAL for review pursuant to Government Code section 11349.1, subdivision (a).<sup>47</sup> <sup>48</sup>

The authorizing statute, Water Code section 13801, is quite explicit in identifying the specific Bulletin and omits any reference to future supplements or revisions. Thus, as is clearly illustrated by the emphasized language in section 3 of the Ordinance (quoted above), the Board has given the language of Water Code section 13801 broader meaning.

Other sections of the Ordinance also go beyond mere implementation of the standards contained in the Bulletin. A few more examples of the Ordinance's provisions, along with a brief discussion of their "regulatory" nature, are outlined below.

- (1) Section 1 contains a statement of purpose and definitions, including the definition of "Well or Water Well" in section 1.2.5:

"The California Water Code, Section 13710, defines well or water well to mean '. . . any artificial excavation constructed by any method for the purpose of extracting water from, or injecting water into, the underground.' The State Water Resources Control Board does not intend that potholes, drainage trenches or canals, waste water ponds, shallow root zone piezometers, stockponds, or similar excavations be included within the definition of wells." [Emphasis added.]

Water Code section 13710, partially quoted in section 1.2.5, continues,

"This definition shall not include: (a) oil and gas wells, or geothermal wells constructed under the jurisdiction of the Department of Conservation, except those wells converted to use as water wells; or (b) wells used for the purpose of (1) dewatering excavation during construction, or (2) stabilizing hillsides or earth embankments."

It is evident that the Board's definition of "well or water well" is not identical to that contained in Water Code section 13710. Thus, the emphasized provisions are the Board's own interpretation, not merely a duplication or rephrasing of statute.

- (2) Sections 2.2, 2.4.4, 6 and 6.2 reflect that the Ordinance contains provisions which directly and indirectly regulate the enforcement agency.

Section 2.2, "Application Procedure," provides:

"Applications for permits shall be made to the enforcement agency on forms approved by the agency and shall contain all such information the enforcement agency requires to accomplish the purposes of this ordinance. . . . If the Enforcement Agency finds the application contains all necessary information, it shall issue to the applicant a comprehensive permit containing such conditions as are necessary to fulfill the purposes of this ordinance." [Emphasis added.]

Section 2.4.4, "Proper Disposal of Drilling Fluids," provides:

"The permit shall contain a clause requiring the safe and appropriate handling and disposal of drilling fluids and other drilling materials used in connection with the permitted work." [Emphasis added.]

Section 6, "Inspections," provides:

"The enforcement agency shall make an inspection of the annular seal construction work. . . ."

"6.1 . . . Upon receipt of an application, the enforcement agency may make an inspection of the drilling site prior to the issuance of a well permit. The purpose of this inspection is to determine whether there are any site conditions such that the enforcement agency shall do the following:

"6.1.1 . . . Require relocation of the drilling site should the location shown on the permit application be too close to potential sources of pollution.

"6.1.2 . . . set additional conditions if needed to remediate any previously unknown ground water quality protection problems.

"6.2 . . . The enforcement agency shall inspect the annular space route depth prior to the sealing." [Emphasis added.]

As can be seen by the emphasized language above, sections 2.2, 2.4.4, 6 and 6.2 are regulating not only the permittees or persons who would be subject to the requirements of the challenged Ordinance, but also the enforcing agency. As Water Code section 13801 does not mention any enforcement standards, it is apparent that the Ordinance acts to interpret and make the statute more specific.

(3) Section 8.1, "Right of Hearing," provides:

"Any person whose application for a permit has been denied, or granted conditionally, or whose permit has been suspended or revoked, or whose variance request has been denied, may appeal to the Board in writing, within 10 days after any such denial, additional granting, suspension, or revocation. Such appeal shall specify the grounds upon which it is taken, and shall be accompanied by a filing fee as set forth herein. The clerk of

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the Board shall set such appeal for hearing at the earliest practicable time, and shall notify the appellant and the enforcement agency, in writing, of the time so set at least 5 days prior to the hearing."

Again, the Ordinance goes beyond Water Code section 13801. That statute is silent on appeals or appeal procedures.

The Ordinance has been examined to determine whether the requirements contained in it represent mere restatements of the law or the only tenable interpretation of the law. As seen from the discussion above, they are more than that. The challenged Ordinance implements, interprets and makes specific Water Code section 13801.

WE THUS CONCLUDE THAT THE BOARD'S ORDINANCE IS A "REGULATION" WITHIN THE MEANING OF THE KEY PROVISION OF GOVERNMENT CODE SECTION 11342, SUBDIVISION (b).

THIRD, WE INQUIRE WHETHER THE CHALLENGED RULE FALLS WITHIN ANY ESTABLISHED GENERAL EXCEPTION TO THE APA REQUIREMENTS.

Generally, all "regulations" issued by state agencies are required to be adopted pursuant to the APA, unless expressly exempted by statute.<sup>49</sup> Rules concerning certain activities of state agencies -- e.g., "internal management" -- are not subject to the procedural requirements of the APA.<sup>50</sup>

The issue of the applicability of exceptions to the APA requirements was not raised by either the Requester or the Board. Our independent review discloses no applicable exceptions.

Having found the challenged rule to be a "regulation" and not exempt from the requirements of the APA, we conclude that the rule violates Government Code section 11347.5, subdivision (a).

### III. CONCLUSION

For the reasons set forth above, OAL finds that:

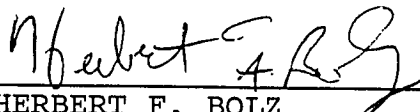
- (1) the Board's rules are generally required to be adopted pursuant to the APA;
- (2) the Model Well Standards Ordinance is a "regulation" as defined in the key provision of Government Code section 11342, subdivision (b);

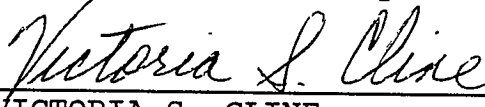
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(3) the Model Well Standards Ordinance does not fall within any recognized exception to the requirements of the APA; and, therefore,

(4) the Model Well Standards Ordinance violates Government Code section 11347.5, subdivision (a).

DATE: December 26, 1990

  
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NOTES

1. This Request for Determination was filed by Arthur E. Goulet, Director, Public Works Agency of the County of Ventura, 800 South Victoria Avenue, Ventura, CA 93009. The State Water Resources Control Board was represented by Jorge A. Leon, Staff Counsel, 901 P Street, P.O. Box 100, Sacramento, CA 95812-0100, (916) 322-5942.

To facilitate the indexing and compilation of determinations, OAL began, as of January 1, 1989, assigning consecutive page numbers to all determinations issued within each calendar year, e.g., the first page of this determination, as filed with the Secretary of State and as distributed in typewritten format by OAL, is "600" rather than "1." Different page numbers are necessarily assigned when each determination is later published in the California Regulatory Notice Register.

2. The legal background of the regulatory determination process --including a survey of governing case law--is discussed at length in note 2 to 1986 OAL Determination No. 1 (Board of Chiropractic Examiners, April 9, 1986, Docket No. 85-001), California Administrative Notice Register 86, No. 16-Z, April 18, 1986, pp. B-14--B-16, typewritten version, notes pp. 1-4. See also Grier v. Kizer (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244, 249-250, modified on other grounds, 219 Cal.App.3d 1151e, petition for review unanimously denied, June 21, 1990 (APA was enacted to establish basic minimum procedural requirements for the adoption, amendment or repeal of state administrative regulations).

In August 1989, a second survey of governing case law was published in 1989 OAL Determination No. 13 (Department of Rehabilitation, August 30, 1989, Docket No. 88-019), California Regulatory Notice Register 89, No. 37-Z, p. 2833, note 2. The second survey included (1) five cases decided after April 1986 and (2) seven pre-1986 cases discovered by OAL after April 1986. Persuasive authority was also provided in the form of nine opinions of the California Attorney General which addressed the question of whether certain material was subject to APA rulemaking requirements.

In November 1990, a third survey of governing case law was published in 1990 OAL Determination No. 12 (Department of Finance, November 2, 1990, Docket No. 89-019 [printed as "89-020"]), California Regulatory Notice Register 90, No. 46-Z, page 1693, note 2. The third survey included (1) five appellate court cases which were decided during 1989 and 1990, and (2) two California Attorney General opinions: one opinion issued before the enactment of Government Code section 11347.5, and the other opinion issued thereafter.



Readers aware of additional judicial decisions concerning "underground regulations"--published or unpublished--are invited to furnish OAL's Regulatory Determinations Unit with a citation to the opinion and, if unpublished, a copy of the opinion. (Whenever a case is cited in a regulatory determination, the citation is reflected in the Determinations Index.) Readers are also encouraged to submit citations to Attorney General opinions addressing APA compliance issues.

3. Title 1, California Code of Regulations ("CCR") (formerly known as the "California Administrative Code"), subsection 121(a), provides:

"'Determination' means a finding by OAL as to whether a state agency rule is a 'regulation,' as defined in Government Code section 11342(b), which is invalid and unenforceable unless

(1) it has been adopted as a regulation and filed with the Secretary of State pursuant to the APA, or,

(2) it has been exempted by statute from the requirements of the APA." [Emphasis added.]

See Grier v. Kizer (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244, modified on other grounds, 219 Cal.App.3d 1151e, petition for review unanimously denied, June 21, 1990 (finding that Department of Health Services' audit method was invalid and unenforceable because it was an underground regulation which should be adopted pursuant to the APA); and Planned Parenthood Affiliates of California v. Swoap (1985) 173 Cal.App.3d 1187, 1195, n. 11, 219 Cal.Rptr. 664, 673, n. 11 (citing Gov. Code sec. 11347.5 in support of finding that uncodified agency rule which constituted a "regulation" under Gov. Code sec. 11342, subd. (b), yet had not been adopted pursuant to the APA, was "invalid").

4. In a recent case, the Second District Court of Appeal, Division Three, held that a Medi-Cal audit statistical extrapolation rule utilized by the Department of Health Services must be adopted pursuant to the APA. Grier v. Kizer (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244. Prior to this court decision, OAL had been requested to determine whether or not this Medi-Cal audit rule met the definition of "regulation" as found in Government Code section 11342, subdivision (b), and therefore was required to be adopted pursuant to the APA. Pursuant to Government Code section 11347.5, OAL issued a determination concluding that the audit rule did meet the definition of "regulation," and therefore was subject to APA requirements. 1987 OAL Determination No. 10 (Department of Health Services, Docket

No. 86-016, August 6, 1987). The Grier court concurred with OAL's conclusion.

The Grier court stated that the

"Review of [the trial court's] decision is a question of law for this court's independent determination, namely, whether the Department's use of an audit method based on probability sampling and statistical extrapolation constitutes a regulation within the meaning of section 11342, subdivision (b). [Citations.]" (219 Cal.App.3d at p. 434, 268 Cal.Rptr. at p. 251.)

Concerning the treatment of 1987 OAL Determination No. 10, which was submitted to the court for consideration in the case, the court further found:

"While the issue ultimately is one of law for this court, 'the contemporaneous administrative construction of a statute by those charged with its enforcement and interpretation is entitled to great weight, and courts generally will not depart from such construction unless it is clearly erroneous or unauthorized. [Citations.]' [Citations.] [Par.] Because [Government Code] section 11347.5, subdivision (b), charges the OAL with interpreting whether an agency rule is a regulation as defined in [Government Code] section 11342, subdivision (b), we accord its determination due consideration." [Id.; emphasis added.]

The court also ruled that OAL's Determination, that "the audit technique had not been duly adopted as a regulation pursuant to the APA, . . . [and therefore] deemed it to be an invalid and unenforceable 'underground' regulation," was "entitled to due deference." [Emphasis added.]

Other reasons for according "due deference" to OAL determinations are discussed in note 5 of 1990 OAL Determination No. 4 (Board of Registration for Professional Engineers and Land Surveyors, February 14, 1990, Docket No. 89-010), California Regulatory Notice Register 90, No. 10-Z, March 9, 1990, p. 384.

##### 5. Note Concerning Comments and Responses

In general, in order to obtain full presentation of contrasting viewpoints, we encourage not only affected rule-making agencies but also all interested parties to submit written comments on pending requests for regulatory determination. (See Title 1, CCR, sections 124 and 125.) The comment submitted by the affected agency is referred to as the "Response." If the affected agency concludes that

part or all of the challenged rule is in fact an "underground regulation," it would be helpful, if circumstances permit, for the agency to concede that point and to permit OAL to devote its resources to analysis of truly contested issues.

No public comments were submitted in this proceeding.

The Board's Response to the Request for Determination was received by OAL on August 20, 1990 and was considered in this proceeding.

6. If an uncodified agency rule is found to violate Government Code section 11347.5, subdivision (a), the rule in question may be validated by formal adoption "as a regulation" (Government Code section 11347.5, subd. (b)) or by incorporation in a statutory or constitutional provision. See also California Coastal Commission v. Quanta Investment Corporation (1980) 113 Cal.App.3d 579, 170 Cal.Rptr. 263 (appellate court authoritatively construed statute, validating challenged agency interpretation of statute.)
7. Pursuant to Title 1, CCR, section 127, this Determination shall become effective on the 30th day after filing with the Secretary of State. This Determination was filed with the Secretary of State on the date shown on the first page of this Determination.
8. We refer to the portion of the APA which concerns rulemaking by state agencies: Chapter 3.5 of Part 1 ("Office of Administrative Law") of Division 3 of Title 2 of the Government Code, sections 11340 through 11356.

The rulemaking portion of the APA and all OAL Title 1 regulations are both reprinted and indexed in the annual APA/OAL regulations booklet, which is available from OAL's Information Services Unit for \$3.00 (\$4.65 if mailed).

9. Government Code section 11347.5 provides:

"(a) No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a ['']regulation[''] as defined in subdivision (b) of Section 11342, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been

adopted as a regulation and filed with the Secretary of State pursuant to this chapter.

- "(b) If the office is notified of, or on its own, learns of the issuance, enforcement of, or use of, an agency guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule which has not been adopted as a regulation and filed with the Secretary of State pursuant to this chapter, the office may issue a determination as to whether the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, is a [']regulation['] as defined in subdivision (b) of Section 11342.
- "(c) The office shall do all of the following:
1. File its determination upon issuance with the Secretary of State.
  2. Make its determination known to the agency, the Governor, and the Legislature.
  3. Publish a summary of its determination in the California Regulatory Notice Register within 15 days of the date of issuance.
  4. Make its determination available to the public and the courts.
- "(d) Any interested person may obtain judicial review of a given determination by filing a written petition requesting that the determination of the office be modified or set aside. A petition shall be filed with the court within 30 days of the date the determination is published.
- "(e) A determination issued by the office pursuant to this section shall not be considered by a court, or by an administrative agency in an adjudicatory proceeding if all of the following occurs:
1. The court or administrative agency proceeding involves the party that sought the determination from the office.

2. The proceeding began prior to the party's request for the office's determination.
3. At issue in the proceeding is the question of whether the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule which is the legal basis for the adjudicatory action is a [']regulation['] as defined in subdivision (b) of Section 11342."

[Emphasis added.]

10. Grier v. Kizer, (1990) 219 Cal.App.3d 422, 431, 268 Cal.Rptr. 244, 249.
11. Water Code section 13001.
12. "'Waters of the state' means any water, surface or underground, including saline waters within the boundaries of the state." Water Code section 13050, subdivision (e).
13. Water Code sections 13000, 13140.
14. See Water Code section 13000.
15. Water Code section 13200.
16. Water Code section 13100, Government Code section 12805.
17. We discuss the affected agency's rulemaking authority (see Gov. Code, sec. 11349, subd. (b)) in the context of reviewing a Request for Determination for the purposes of exploring the context of the dispute and of attempting to ascertain whether or not the agency's rulemaking statute expressly requires APA compliance. If the affected agency should later elect to submit for OAL review a regulation proposed for inclusion in the California Code of Regulations, OAL will, pursuant to Government Code section 11349.1, subdivision (a), review the proposed regulation in light of the APA's procedural and substantive requirements.

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The APA requires all proposed regulations to meet the six substantive standards of Necessity, Authority, Clarity, Consistency, Reference, and Nonduplication. OAL does not review alleged "underground regulations" to determine whether or not they meet the six substantive standards applicable to regulations proposed for formal adoption.

The question of whether the challenged rule would pass muster under the six substantive standards need not be decided until such a regulatory filing is submitted to us under Government Code section 11349.1, subdivision (a). At that time, the filing will be carefully reviewed to ensure that it fully complies with all applicable legal requirements.

Comments from the public are very helpful to us in our review of proposed regulations. We encourage any person who detects any sort of legal deficiency in a proposed regulation to file comments with the rulemaking agency during the 45-day public comment period. (Only persons who have formally requested notice of proposed regulatory actions from a specific rulemaking agency will be mailed copies of that specific agency's rulemaking notices.) Such public comments may lead the rulemaking agency to modify the proposed regulation.

If review of a duly-filed public comment leads us to conclude that a regulation submitted to OAL does not in fact satisfy an APA requirement, OAL will disapprove the regulation. (Gov. Code, sec. 11349.1.)

18. The State Board also succeeds to rulemaking powers previously delegated to certain other entities. Water Code section 179 provides:

"The board succeeds to and is vested with all of the powers, duties, purposes, responsibilities, and jurisdiction vested in the Department and Director of Public Works, the Division of Water Resources of the Department of Public Works, the State Engineer, the State Water Quality Control Board, or any officer or employee thereof, under Division 2 (commencing with Section 1000), except Part 4 (commencing with Section 4000) and Part 6 (commencing with Section 5900) thereof; and Division 7 (commencing with Section 13000) of this code, or any other law under which permits or licenses to appropriate water are issued, denied, or revoked or under which the functions of water pollution and quality control are exercised."  
[Emphasis added.]

19. Water Code section 174.
20. Kerr's Catering Service v. Department of Industrial Relations (1962) 57 Cal.2d 319, 330, 19 Cal.Rptr. 492, 498; City of San Marcos v. California Com'n, Dept. of Transp. (1976) 60 Cal.App.3d 383, 405, 131 Cal.Rptr. 804, 818.
21. This conclusion is consistent with our previous Determination opinions. (1989 OAL Determination No. 4 (State Water Resources Control Board and San Francisco Regional Water Quality Control Board, March 29, 1989, Docket No. 88-006), California Regulatory Notice Register 89, No. 16-Z, April 21, 1989, p. 1026; 1989 OAL Determination No. 8 (State Water Resources Control Board, May 17, 1989, Docket No. 88-010), California Regulatory Notice Register 89, No. 22-Z, June 2, 1989, p. 1585.)
22. California Regulatory Notice Register 90, No. 27-Z, July 6, 1990, pp. 1037-1038.
23. See Faulkner v. California Toll Bridge Authority (1953) 40 Cal.2d 317, 324 (point 1); Winzler & Kelly v. Department of Industrial Relations (1981) 121 Cal.App.3d 120, 174 Cal.Rptr. 744 (points 1 and 2); and cases cited in note 2 of 1986 OAL Determination No. 1. A complete reference to this earlier Determination may be found in note 2 to today's Determination.
24. The section goes on to list exceptions to the filing requirement, none of which are applicable here.
25. Government Code section 11000 states in part:

"As used in this title [Title 2. Government of the State of California] 'state agency' includes every state office, officer, department, division, bureau, board, and commission."

Section 11000 is contained in Title 2, Division 3 (Executive Department), Part 1 (State Department and Agencies), Chapter 1 (State Agencies) of the Government Code.
26. Government Code section 11342, subdivision (a).

27. See Winzler & Kelly v. Department of Industrial Relations (1981) 121 Cal.App.3d 120, 126-128, 174 Cal.Rptr. 744, 746-747 (unless "expressly" or "specifically" exempted, all state agencies not in legislative or judicial branch must comply with rulemaking part of APA when engaged in quasi-legislative activities); Poschman v. Dumke (1973) 31 Cal.App.3d 932, 943, 107 Cal.Rptr. 596, 603.
28. The State Board's rulemaking authority under section 1058 was expanded in 1969 to include regulations on water quality control under the Porter-Cologne Water Quality Control Act, Division 7 of the Water Code, sections 13000 through 13999.16 (the "Porter-Cologne Act"). As part of the major revision of statutes under the Porter-Cologne Act, Water Code section 1058 was amended to authorize the adoption of regulations to carry out the State Board's powers and duties "under this code." It previously read "under this division." This change was recommended in a report entitled, "Recommended Changes in Water Quality Control, Final Report of the Study Panel to the California State Water Resources Control Board, Study Project, Water Quality Control Program (1969)." In the report, the proposed amendment was followed by a note which provides:

"Amendment would authorize the state board to issue regulations with respect to water quality under the provisions of [the Porter-Cologne Water Quality Control Act]." [Emphasis added.]

The report is to be given substantial weight in interpreting the Porter-Cologne Act. (People v. Berry (1987) 194 Cal.App.3d 158, 173-174, 239 Cal.Rptr. 349, 359.)

29. The adoption of regulations to set statewide policy on water quality control is consistent with legislative views on the adoption of statewide policy for control of water pollution under the Dickey Water Pollution Act of 1949 (Stats. 1949, c. 1549), the forerunner of the Porter-Cologne Act. Those views are evidenced by this excerpt from the First Report of the Senate Interim Committee on Administrative Regulations to the 1955 Legislature (p. 59):

"The State Water Pollution Control Board is an independent agency of government which is closely aligned to the Division of Water Resources and is charged with the formulation of a state-wide policy for the control of water pollution, the administration of a state-wide program of financial assistance for water pollution control, and administering a state-wide program of research into technical phases of water pollution control.

. . . .



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"The board is specifically authorized to adopt rules and regulations for the administration of the Water Pollution Control laws, but such authority does not specify the procedure to be followed in the adoption of regulations or establishing state-wide policy, nor is it limited in all cases to regulations which are reasonably necessary.

". . . .

"The board does not believe its functions are of a type which makes it necessary to adopt any large quantity of rules or regulations, but the board does try to coordinate the policies of the nine regional control boards by a Preliminary Statement of Objective and Policy, which the board believes to be only advisory in nature.

"The committee recommends the following, relating to the authority of the board to adopt regulations:

". . . .

". . . .

"3. The formulation of a state-wide policy should be required to be accomplished by way of regulation to permit public participation in the processes." [Emphasis added.]

When this report was issued, Water Code section 13020 authorized the State Water Pollution Control Board to adopt regulations and Water Code section 13022 provided:

"The state board shall formulate a state-wide policy for control of water pollution with due regard for the authority of the regional boards."

We note that the court in Armistead v. State Personnel Board ((1978) 22 Cal.3d 198, 202 and 205, 149 Cal.Rptr. 1, 2 and 4) relied heavily on the 1955 report to the Legislature as an indicator of legislative intent with regard to the adoption of regulations by the State Personnel Board. We further note that the State Personnel Board's enabling legislation did not expressly require the adoption of all of its regulations pursuant to the APA, a situation parallel to the instant one.

30. Section 641 of Title 23 of the CCR provides that "[t]he regulations contained in [chapter 3 of Title 23, which begins at section 640] are adopted for the purpose of implementing and carrying out provisions of . . . , [the Porter-Cologne Act]."
31. It is interesting to note that the State Board's own regulations recognize that "regulations" adopted by the State Board are subject to the APA. Subdivision (a) of section 649 of Title 23 of the CCR provides:

"(a) 'Rulemaking proceedings' shall include any hearings designed for the adoption, amendment, or repeal of any rule, regulation, or standard of general application, which implements, interprets or makes specific any statute enforced or administered by the State and Regional Boards."  
[Emphasis added.]

Section 649.1 of Title 23 provides:

"Proceedings to adopt regulations, including notice thereof, shall, as a minimum requirement, comply with all applicable requirements established by the Legislature (Government Code Section 11340, et seq.) [the APA]. This section is not a limitation on additional notice requirements contained elsewhere in this chapter."  
[Emphasis added.]

32. (1990) 219 Cal.App.3d 422, 440, 268 Cal.Rptr. 244, 251.
33. (1990) 219 Cal.App.3d 422, 438, 268 Cal.Rptr. 244, 253.
34. Roth v. Department of Veteran Affairs (1980) 110 Cal.App.3d 622, 167 Cal.Rptr. 552; California State Employees' Association v. State of California (1990) 222 Cal.App.3d 491, 271 Cal.Rptr. 734, petition for review filed September 1, 1990. See Faulkner v. California Toll Bridge Authority (1953) 40 Cal.2d 317, 323-324 (standard of general application applies to all members of any open class)."
35. Stoneham v. Rushen (1982) 137 Cal.App.3d 729, 188 Cal.Rptr. 130; Faunce v. Denton (1985) 167 Cal.App.3d 191, 213 Cal.Rptr. 122.
36. Although termed a "model" Ordinance, its minimum requirements must be met or exceeded by ordinances of each county, city or water agency, statewide, or the Board's Ordinance takes effect and is enforced.

37. Pages 6, 7.
38. OAL also does not here analyze each provision or section, as examples suffice to draw a logical and legal conclusion. A few provisions may, therefore, be nonregulatory.
39. The Board cited Nadler v. California Veterans Board (1984) 152 Cal.App.3d 707, 199 Cal.Rptr. 546 and California Coastal Commission v. Quanta Investment Corp. (1981) 113 Cal.App.3d 579, 170 Cal.Rptr. 263 as authority. As the present Determination does not involve mere restatements of law or the only tenable reading of law, Nadler and Quanta are inapplicable.
40. 1988 OAL Determination No. 15 (State Water Resources Control Board, September 2, 1988, Docket No. 87-021), California Regulatory Notice Register 88-Z, September 16, 1988, p. 3004.
41. 1986 OAL Determination No. 2 (Coastal Commission, April 30, 1986, Docket No. 85-003), California Administrative Notice Register 86, No. 20-Z, May 16, 1986, p. B-31; typewritten version, p. 9.
42. 1986 OAL Determination No. 4 (State Board of Equalization, June 25, 1986, Docket No. 85-005) California Administrative Notice Register 86, No. 28-Z, July 11, 1986, p. B-15, typewritten version, p. 12.
43. The DWR initially printed water well standards in February 1968: "Bulletin 74." Since that time, changes in the field of well construction together with the experiences of applying the 1968 standards have necessitated revising and updating them. Bulletin 74-81 is the update of Bulletin 74.
44. Statutes of 1949, chapter 1552 originally directed the Department of Public Works to investigate and survey conditions of damage to quality of underground water caused by improperly constructed, abandoned or defective wells and to report to the appropriate regional water pollution control board its recommendations for minimum standards of well construction. These responsibilities are now lodged in the DWR by Water Code section 231. (Bulletin, pp. 2, 3.)
45. Section 231 provides:

"The [DWR] either independently or in cooperation with any person or any county, state, federal or other

agency, shall investigate and survey conditions of damage to quality of underground waters, which conditions are or may be caused by improperly constructed, abandoned or defective wells through the interconnection of strata or the introduction of surface waters into underground waters. The [DWR] shall report to the appropriate California regional water quality control board its recommendations for minimum standards of well construction in any particular locality in which it deems regulation necessary to protection of quality of underground water, and shall report to the Legislature from time to time, its recommendations for proper sealing of abandoned wells."

46. 1989 OAL Determination No. 14 (Department of Corrections, September 21, 1989, Docket No. 89-001), California Regulatory Notice Register 89, No. 40-Z, October 6, 1989, p. 2947, n. 60; 1988 OAL Determination No. 9 (Department of Industrial Relations, Division of Labor Standards Enforcement, June 9, 1988, Docket No. 87-015), California Regulatory Notice Register 88, No. 26-Z, June 24, 1988, p. 2160, n. 48 and associated text.
47. See note 17, above.
48. The Bulletin's history is quite revealing. The Bulletin was originally created as "Bulletin 74." As revised in 1981, it was renamed "Bulletin 74-81." In our view, the statutory incorporation of "Bulletin 74-81" (emphasis added) indicates the legislative intent that only the standards contained in the 1981 edition be implemented. Surely, if future editions or revisions were also intended to be included, the Legislature would have known what language to use to make that intent understood. Case law holds that "neither a court nor executive agency may supply omitted terms or rewrite a statute to conform to an unexpressed intent." (Daley v. State Dept. of Social Services (1969) 276 Cal.App.2d 801, 804, 81 Cal.Rptr.318, 320, [citation omitted].)
49. Government Code section 11346.
50. The following provisions of law may permit rulemaking agencies to avoid the APA's requirements under some circumstances:
  - a. Rules relating only to the internal manage-

ment of the state agency. (Gov. Code, sec. 11342, subd. (b).)

- b. Forms prescribed by a state agency or any instructions relating to the use of the form, except where a regulation is required to implement the law under which the form is issued. (Gov. Code, sec. 11342, subd. (b).)
- c. Rules that "[establish] or [fix] rates, prices, or tariffs." (Gov. Code, sec. 11343, subd. (a)(1).)
- d. Rules directed to a specifically named person or group of persons and which do not apply generally throughout the state. (Gov. Code, sec. 11343, subd. (a)(3).)
- e. Legal rulings of counsel issued by the Franchise Tax Board or the State Board of Equalization. (Gov. Code, sec. 11342, subd. (b).)
- f. There is limited authority for the proposition that contractual provisions previously agreed to by the complaining party may be exempt from the APA. City of San Joaquin v. State Board of Equalization (1970) 9 Cal.App.3d 365, 376, 88 Cal.Rptr. 12, 20 (sales tax allocation method was part of a contract which plaintiff had signed without protest); see Roth v. Department of Veterans Affairs (1980) 110 Cal.App.3d 622, 167 Cal.Rptr. 552 (dictum); Nadler v. California Veterans Board (1984) 152 Cal.App.3d 707, 719, 199 Cal.Rptr. 546, 553 (same); but see Government Code section 11346 (no provision for non-statutory exceptions to APA requirements); see Del Mar Canning Co. v. Payne (1946) 29 Cal.2d 380, 384 (permittee's agreement to abide by the rules in application may be assumed to have been forced on him by agency as a condition required of all applicants for permits, and in any event should be construed as an agreement to abide by the lawful and valid rules of the commission); see International Association of Fire Fighters v. City of San Leandro (1986) 181 Cal.App.3d 179, 182, 226 Cal.Rptr. 238, 240 (contracting party not estopped from challenging legality of "void and unenforceable" contract provision to which party had previously agreed); see Perdue v. Crocker National Bank (1985) 38

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Cal.3d 913, 926, 216 Cal.Rptr. 345, 353  
("contract of adhesion" will be denied  
enforcement if deemed unduly oppressive or  
unconscionable).

Items a, b, and c, which are drawn from Government Code section 11342, subdivision (b), may also correctly be characterized as "exclusions" from the statutory definition of "regulation"--rather than as APA "exceptions." Whether or not these three statutory provisions are characterized as "exclusions," "exceptions," or "exemptions," it is nonetheless first necessary to determine whether or not the challenged agency rule meets the two-pronged "regulation" test: if an agency rule is either not (1) a "standard of general application" or (2) "adopted . . . to implement, interpret, or make specific the law enforced or administered by [the agency]," then there is no need to reach the question of whether the rule has been (a) "excluded" from the definition of "regulation" or (b) "exempted" or "excepted" from APA rulemaking requirements. Also, it is hoped that separately addressing the basic two-pronged definition of "regulation" makes for clearer and more logical analysis, and will thus assist interested parties in determining whether or not other uncodified agency rules violate Government Code section 11347.5. In Grier v. Kizer (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244, modified on other grounds, 219 Cal.App.3d 1151e, petition for review unanimously denied, June 21, 1990, the Court followed the above two-phase analysis.

The above is not intended as an exhaustive list of possible APA exceptions. Further information concerning general APA exceptions is contained in a number of previously issued OAL determinations. The quarterly Index of OAL Regulatory Determinations is a helpful guide for locating such information. (See "Administrative Procedure Act" entry, "Exceptions to APA requirements" subheading.)

The Determinations Index, as well as an order form for purchasing copies of individual determinations, is available from OAL (Attn: Tande' Montez), 555 Capitol Mall, Suite 1290, Sacramento, CA 95814, (916) 323-6225, ATSS 8-473-6225. The price of the latest version of the Index is available upon request. Also, regulatory determinations are published every two weeks in the California Regulatory Notice Register, which is available from OAL at an annual subscription rate of \$138.

Though the quarterly Determinations Index is not published in the Notice Register, OAL accepts standing orders for Index updates. If a standing order is submitted, OAL will periodically mail out Index updates with an invoice.

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51. We wish to acknowledge the substantial contribution of Unit Legal Assistant Melvin Fong and Senior Legal Typist Tande' Montez in the processing of this Request and in the preparation of this Determination.